

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

KENNETH MCMASTER,

Plaintiff,

-v-

9:15-CV-578
(DNH/CFH)

L. W. LABARGE, Correction Officer, Upstate
Correctional Facility; S. D. LAMARE, Correction
Officer, Upstate Correctional Facility; E. SMITH,
Correction Officer, Upstate Correctional Facility;
K. ELLSWORTH, Correction Officer, Upstate
Correctional Facility; J. G. TATRO, Lieutenant
for Corrections, Upstate Correctional Facility;
M. C. TOMPKINS, Sergeant for Corrections,
Upstate Correctional Facility; and C. S. ROWE,
Sergeant for Corrections, Upstate Correctional
Facility;

Defendants.

APPEARANCES:

KENNETH MCMASTER
Plaintiff pro se
08-B-1832
Southport Correctional Facility
P.O. Box 2000
Pine City, NY 14871

BARBARA D. UNDERWOOD
Attorney General for the State of New York
Attorney for Defendants
The Capitol
Albany, NY 12224

BRIAN W. MATULA, ESQ.
Ass't Attorney General

DAVID N. HURD
United States District Judge

DECISION and ORDER

Pro se plaintiff Kenneth McMaster brought this civil rights action pursuant to 42 U.S.C. § 1983. On April 10, 2018, the Honorable Christian F. Hummel, United States Magistrate Judge, advised by Report-Recommendation that defendants' motion for partial summary judgment be granted in part and denied in part. Plaintiff filed timely objections to the Report-Recommendation.

Based upon a de novo review of the portions of the Report-Recommendation to which plaintiff objected, the Report-Recommendation is accepted and adopted in all respects. See 28 U.S.C. § 636(b)(1).

Therefore, it is

ORDERED that

1. Defendants' motion for partial summary judgment is GRANTED in part and DENIED in part;

2. Defendants' motion for summary judgment dismissing plaintiff's excessive force claims against C.O. Smith and C.O. Lamare arising out of the **November 16, 2014** incident for non-exhaustion is GRANTED and those claims are DISMISSED;

3. Defendants' motion for summary judgment dismissing plaintiff's excessive force claim against C.O. Smith arising out of the alleged **November 15, 2014** incident is GRANTED and that claim is DISMISSED;

4. C.O. Smith is DISMISSED from this action with prejudice;

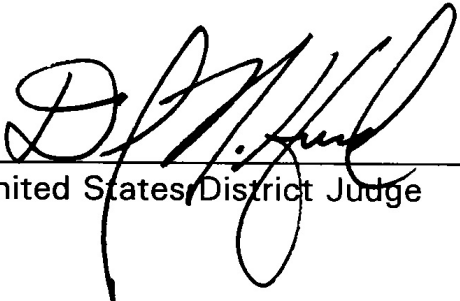
5. Defendants' motion for summary judgment dismissing plaintiff's First Amendment retaliation claim against C.O. LaBarge is DENIED;

6. Defendants' motion for summary judgment dismissing plaintiff's excessive force and failure to intervene claims against C.O. Lamare, C.O. LaBarge, C.O. Ellsworth, Lieut. Tatro, Sgt. Tompkins, and Sgt. Rowe for the incidents alleged to have occurred on **November 15, 2014** due to non-exhaustion is DENIED without prejudice to defendants' ability to request an exhaustion hearing to assess whether plaintiff exhausted his administrative remedies;

7. The following claims will proceed: plaintiff's First Amendment retaliation claim against C.O. LaBarge and plaintiff's excessive force and failure to intervene claims against C.O. Lamare, C.O. LaBarge, C.O. Ellsworth, Lieut. Tatro, Sgt. Tompkins, and Sgt. Rowe for the incidents alleged to have occurred on **November 15, 2014**;

8. Trial on the remaining claims is scheduled for February 5, 2019, in Utica, New York.

IT IS SO ORDERED.


United States District Judge

Dated: September 4, 2018
Utica, New York.